No. 2444.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Defendant in Error.

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Filed this ..... day of November, 1914.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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DISTRICT OF CALIFORNIA.

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THE UNITED STATES OF AMERICA,
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REPLY BRIEF OF DEFENDANT IN ERROR.

I.

There can be no dispute as to the facts of this case. The plaintiff in error, Steinfeldt, is shown to have had possession of smoking opium in San Francisco, knowing the same to have been smuggled unlawfully into the United States. He is not found to have had anything to do with the original entry of the contraband into the United States.

II.

THE ISSUES

Appellant attacks the last portion of Section 2 of the Act of February 9th, 1909, 35 Stat. L., 614, on the ground that it is unconstitutional in that it is an exercise by Congress or the Federal government of the police power reserved to the States. Appellant concedes that the first portion of Section 2 is undoubtedly constitutional. This portion reads as follows:

> "SEC. 2. (PENALTY FOR VIOLATION—POSSESSION, PROOF OF GUILT.) That if any person shall fraudulently, or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law,"

It is claimed, however, that the concluding portion of the section is an infringement upon the States' police power and is therefore unconstitutional.

> "or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both."

In other words, it is claimed that if A smuggles smoking opium into the United States and is apprehended, any punishment meted out to him under this section is constitutional. The point appellant makes is that should A smuggle opium into the United States and then pass it to B who takes it, knowing the same to have entered unlawfully, Federal jurisdiction has ceased and the prosecution of B is unconstitutional. If B passed it to C who in turn passed it to D, each taking knowingly, that these parties are outside the pale of the law. It is claimed that with the passing of the opium to B, C or D that it has lost its identity as an article of foreign commerce and has become mixed with the taxable property of the State, and that any attempt to hold B, C or D is a usurpation of the police power of the State to regulate the public health, morals and social welfare of the citizens of the State. It is further contended as a basis for these assumptions that the opium law comes within the delegated powers to the Federal government under the commerce clause, Section 8, Article 3 of the Constitution, and not under the Customs clause, Section 8, Article 1 of the Constitution. With this false premise adopted by appellant the Government cannot agree. However, it will be the purpose of the Government to discuss this question under both clauses of the Constitution. First, it will be shown in this brief that the regulation of the customs pertains thereto and is a matter for the customs officials of the Treasury Department. Then,

conceding that the prohibition of smoking opium by Congress is a regulation of commerce under Section 8, Article 3 of the Constitution, nevertheless the Federal Government may pursue and seize any opium which violates the provision of a commerce regulation and prosecute an offender who knows that such opium has come into the country contrary to the prohibitions of a commerce law. These two phases of the question will be taken up in the order here indicated.

III.

CUSTOMS CLAUSE OR COMMERCE CLAUSE.

To prove to this Court that the opium law does not come under the rules governing the shipment of merchandise in foreign commerce, or that there is an infringement on the police power of the States, the appellee will show that the clause of the Constitution giving Congress the power to regulate customs and imposts governs, and not the commerce clause.

Section 8, Article 1 of the United States Constitution reads as follows:

> *"The Congress shall have power to lay and collect taxes, duties, imposts,* and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

The article giving power to regulate commerce reads:

> "3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The clause giving power to enact laws to enforce the delegated powers is here set forth:

> "18. *To make all laws which shall be necessary and proper for carrying into execution the foregoing powers,* and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof."

It is the Government's contention that the Act of February 9, 1909, was enacted under and by virtue of Articles 1 and 18 above set forth and not with reference to Article 3. Appellant claims that if the objectionable part of the opium law came under customs or revenue then they would concede its constitutionality. They admit that it is a most important distinction yet they pass over it most lightly.

The following is quoted from page 14 of appellant's brief:

> *"Admittedly, if this was an exercise of the revenue law, and an attempt to collect duty upon imports—in other words, if Congress was acting in an endeavor to enforce the revenue statutes—the act would be clearly constitutional;* but there is not the slightest question here but that the act referred to is not passed under the guise of an endeavor to aid the collection of revenue, which it

must be conceded the United States has the right to do, or of any of the constitutional powers of Congress."

This explanation slides so easily over this important distinction. With this mere assertion the appellee cannot agree. The regulation of importation of smoking opium has always been under the revenue and customs laws and under the direct supervision of the Treasury Department. By no stretch of the imagination can its regulation be placed under the Department of Commerce.

The first statute under which unlawful importations of opium were prosecuted is Section 3082 of the Revised Statutes, the Act of March 2, 1799, as amended July 18, 1866. It will be noted that the wording is almost identical with that portion of Section 2 of Act of 1909 to which the appellant objects.

"Sec. 3082. (Concealing or buying goods liable to seizure.) If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law,* such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such

possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury. (R. S.)."

Under the provisions of the law smoking opium came into the United States upon the payment of a duty along with the dutiable merchandise. There were many prosecutions under this law for smuggling smoking opium into the country without paying the duty, a few of which are here set forth:

U. S. v. *Dunbar,* 60 Fed., 75;
U. S. v. *Dunbar,* 156 U. S., 185;
U. S. v. *Gardiner,* 42 Fed., 832.
U. S. v. *Kee Ho,* 33 Fed., 333.

The next legislation on the importation of opium was the Act of February 23rd, 1887, 210 Stat. L., 409:

"(Sec. 1.) (Importation of opium by Chinese prohibited.)"
"Sec. 2 (Forfeiture)."
"Sec. 3. (Citizens of United States prohibited from traffic in opium in China—punishment—jurisdiction—forfeiture.)"

This statute did not repeal Sec. 3082, R. S., above quoted.

By the Act of July 24, 1897, an act to provide revenue for the Government and to encourage the industries of the United States (30 Stat., 151), smoking opium was still regulated by the Treasury Depart-

ment under the title of Duties and Customs. Section 43 of Schedule A of that act reads as follows:

> "Opium, crude or unmanufactured, and not adulterated, containing nine per centum and over of morphia, one dollar per pound; morphia or morphine, sulphate of, and all alkaloids or salts of opium, one dollar per ounce; aqueous extract of opium, for medicinal uses, and tincture of, as laudanum, and other liquid preparations of opium, not specially provided for in this Act, forty per centum ad valorem; opium containing less than nine per centum of morphia, *and opium prepared for smoking, six dollars per pound; but opium prepared for smoking and other preparations of opium, deposited in bonded warehouses shall not be removed therefrom without payment of duties, and such duties shall not be refunded.*"

From this it will be seen that smoking opium was still entering the United States upon the payment of a duty of six dollars a pound. Violations of this law were prosecuted under Sec. 3082, R. S.

In 1909 the opium law under which appellant was prosecuted was enacted.

> "An act to prohibit the importation and use of opium for other than medicinal purposes."

(Act of Feb. 9, 1909, ch. 100, 35 Stat. L. 614).

> "(Sec. 1.) (Opium—importation prohibited.) That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; provided, that opium

and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, *under regulations which the Secretary of the Treasury is hereby* authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law (35 Stat. L., 614).

"Sec. 2. (Penalty for violation—possession, proof of guilt.) That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, etc.*"

It should be noted that the Treasury Department under these provisions must inspect all opium to see whether or not it is smoking opium or opium for medicinal purposes. It is still under the classification of customs duties.

In 1913 Congress again legislated in reference to smoking opium in providing for the revenue. In the Act of October 3rd, 1913, under Chapter 16, "an act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Act of 1909 was reaffirmed. The revenue schedule fixing the duty on opium for medicinal purposes reads as follows:

"Opium, crude or manufactured, and not adul-

terated, containing 9 per centum and over of morphia, $3 per pound; opium of the same composition, dried to contain 15 per centum or less of moisture, . . . *provided, that nothing herein contained shall be construed as to repeal or in any manner impair or affect the provisions of an Act entitled 'An Act to prohibit the importation and use of opium for other than medicinal purposes,' approved February ninth, nineteen hundred and nine.*"

Reasoning from these statutes the Government contends that by no possible reasoning can it be presumed that smoking opium was to be supervised by any other department than the Treasury Department and that whether coming in under a duty or prohibited absolutely it is a matter of customs regulation. Smoking opium and opium for medicinal purposes at one time both came into the United States by paying a duty. Gradually the duty was raised on smoking opium and eventually it was barred out of the country. Opium for medicinal purposes still comes into the country upon paying the revenue, yet is it reasonable to say as appellant now does, that the handling of smoking opium in the United States comes under the provisions and rules of the commerce clause, but that opium for medicinal purposes does not? It can not be said that since there is no revenue now upon smoking opium that it is no longer under customs regulations. The payment of or the non-payment of revenue should not be the criterion. Whether an article enters the United States free of duty or upon

payment of a revenue or is absolutely prohibited the customs officials must inspect it. They must view all opium to see whether or not it is medicinal opium to be allowed to enter or smoking opium to be prevented from coming in. Even though smoking opium is not on the schedule the requirements of the revenue laws are plain, as District Judge Ray said in the customs case of *U. S.* v. *Fifty Waltham Watch Movements,* 139 Fed., 291, 298:

> "Goods entitled to come in free are imported as much as those which pay duty. The requirement of law is as positive that the one class shall come in through the custom houses as that the other shall. This is the policy of the Government in the enforcement of its laws, in the collection of its revenues, in the protection of its interests."

IV.

POWER BY REASONABLE AND PROPER LAWS FOR ENFORCING EITHER THE CUSTOMS REGULATIONS OR FOREIGN COMMERCE.

Section 8, Article 18 of the Federal Constitution, states that Congress shall have power

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

If Congress can impose heavy duties or put up a bar against any article, certainly it must have the means of enforcing such a law. A law without the

necessary penalties to make it valid would be absurd indeed. Now, the appellant maintains that if A brings smoking opium into the country the customs officials may apprehend him, cause a forfeiture of the opium and prosecute him criminally. He has no fault to find with the law thus far. The grievance against the law is in case A passes the opium to B, who takes possession of same, knowing that it has been unlawfully imported. He contends that any procedure against B is unconstitutional in that it violates the State's right of police power to regulate the health, morals and social welfare. It is indeed astounding that when Congress is given the right to make "reasonable" laws for enforcing the customs regulations that it can only go thus far and must then stop. Is Congress only allowed to take out one bite of the cherry and leave the remainder? It must be conceded that B taking possession, knowingly, is an accessory after the fact. He is aiding and abetting A in the unlawful importation, yet appellant says you may take the one but you must leave the other. One might expect the argument from counsel for appellant, that if A stole government property on the United States Military Reservation, the Presidio, and carried it off the Presidio where he sold it to B, who took it knowingly, that B could not be prosecuted by the Government in the Federal Courts for receiving stolen government goods.

If in the case of the opium A brought it into the

country and it passed through twenty hands and the twentieth received and concealed the opium, knowing it to have been unlawfully imported, he is an accessory after the fact. The opium was never lawfully in the country because of the clandestine handling, and the evasion of the prohibition. When second and third parties received and concealed smoking opium after importation under the old statute, Sec. 3082, R. S., above quoted, they were prosecuted. By what logic is it decided that since smoking opium has been prohibited under the Act of 1909 that these accessories after the fact who receive smoking opium after its importation cannot be prosecuted?

A case most emphatically deciding this point in an indictment for receiving and concealing smoking opium under the statute, Sec. 3082, R. S., is the case of *United States* v. *Kee Ho,* 33 Fed., 333, 334, 335. Judge Deady said:

> "The section of the statute under which this indictment is drawn is intended, as the title of the Act from which it is compiled indicates, to prevent smuggling—the clandestine introduction of goods into the United States without passing them through the custom house, and with intent to defraud the revenue of the United States. *But its language is broad enough to include, and does include, every case or form of illegal importation, even where the intent to avoid the payment of duties does not exist, as the bringing in of prohibited goods, or goods packed in prohibited methods.*"
>
> . . . . .

"In a count charging the *secondary offense of buying or receiving goods* imported contrary to law, it is not necessary to describe the original offense with the same particularity of time, place, and circumstances that is required in a count for such original offense. *The rule in the case of an indictment for receiving stolen goods furnishes a safe analogy. In such case it is not necessary to name the thief, nor to allege his conviction, nor to state the time and place when and where the goods were stolen; and, generally, it is sufficient to describe the goods, state their value, and allege that before the receipt thereof by the defendant, they had been stolen or feloniously taken and carried away. U. S.* v. *Claflin,* 13 Blatchf., 184; 1 Whart. Crim. Law, Pars. 997-1004."

The opinion holds that even in a case where smoking opium might be absolutely prohibited from entering the country and where there was no fixed duty that the statute, Sec. 3082, R. S., was broad enough to cover the offense. The decision in that case further holds that the person receiving or concealing smoking opium is in the same position as one who receives stolen goods knowing the same to be stolen.

As further authorities for the holding that those who receive and conceal, knowing that an article has been unlawfully imported by another, may be prosecuted, the following cases are cited:

U. S. v. *Merriam,* 26 Fed. Cas., 1237, No. 15,-759.

U. S. v. *A Lot of Jewelry,* 59 Fed., 684, 687.

V.

THE OPIUM LAW A REGULATION OF FOREIGN COMMERCE.

Under another heading in this brief the contention was advanced that the prohibition of smoking opium from the United States was a matter of customs regulation under the revenue clause of the Constitution. Now conceding and assuming that the enactment of this law by Congress was an exercise of its Constitutional powers under the commerce clause, the arguments for its enforcement under that provision of the Constitution will be advanced. If it is conceded that the opium law is a regulation of commerce the power to enact reasonable and necessary laws for its enforcement under and by virtue of Section 8, Article 18 of the Constitution, applies with the same force as it does to the enforcement of any customs law. An enumerated power is "distinct and independent to be exercised in any case whatever."

M'Culloch v. *Maryland,* 4 Wheat. 421, 422; 4 L. Ed., 605.

Doyle v. *Continental Insurance Co.,* 94 U. S., 535, 541; 24 L. Ed., 148, 152.

The Supreme Court has also most emphatically decided that the power to regulate commerce em-

braces the power to prohibit certain articles from commerce.

U. S. v. *Marigold,* 9 How., 560, 566; 13 L. Ed., 257.
Butterfield v. *Stranahan,* 192 U. S., 470, 493; 48 L. Ed., 525.
Lottery Case, 188 U. S., 321; 47 L. Ed., 492.

If the opium law is a commerce regulation it is only a regulation of foreign commerce and not of interstate. The very wording of the statute makes that limitation in that it states "shall fraudulently or knowingly *import or bring into the United States.*" Whether or not this is a valid distinction is not easily determined but it should be borne in mind that most all the cases cited by appellant are cases dealing with *interstate* commerce as distinguished from *foreign* commerce. The opium law has nothing to do with interstate commerce. Might it not be held that Congress has greater powers in dealing with articles which are of foreign origin and are coming into the United States than in the matter of commodities of trade shipped from one state into another?

If it is taken for granted that the opium law is a regulation of foreign commerce the question to be determined is, may the Federal Government come within the confines of the state to enforce the law? In other words, where Congress has regulated an article of foreign commerce in absolutely prohibiting

its importation into the United States, may the arm of the Government reach out to prosecute an offender who has no connection with the foreign commerce in the article, but simply took it knowingly from the importer?

To deny the Government this power appellant cites many cases on interstate commerce which support the "broken package rule" and "the end of transit rule." With these authorities and these rules we have no quarrel. They are thoroughly established. They hold that where an article has been shipped in interstate commerce, transit ended and the original package broken, the commerce in the article has ceased and it then comes under the supervision of the state. The article at that time is mixed with the mass of property of the state and is subject to its taxes. Is a can of smoking opium an article regulated by this rule? Congress has declared that smoking opium shall not enter into commerce. There are no qualifications. There is no question of adulteration, impurity or misbranding. There is no remedy or anything left undone which may be rectified and thereby make it fit to go into commerce. It is a thing excluded, prohibited and barred out without any exceptions. If it ever comes into the United States its entry is clandestine, in violation of the law and by smuggling. Wherever it may be found it is contraband. It is an outlaw. Its commerce could not start nor could it have any end. The broken package rule or end of transit rule

never had any relation to it. At no time is it mixed with the mass of property of the state so that it might be taxed. It is not an article taxable by the state.

Has Congress the power to pursue contraband opium within the confines of the state and prosecute those offenders who deal in this opium knowing that its importation was a violation of the Federal law? If Congress has no means or machinery to prevent importation, the mere fact that it has a law prohibiting the importation of opium would be almost useless and vain.

In *Gibbons* v. *Ogden,* 9 Wheat., 1, 195; 6 L. Ed., 23, there is the following statement:

> *"In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines.* The commerce of the United States with foreign nations is that of the whole United States; every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists."

The case of *Gilman* v. *Philadelphia,* 2 Wall., 713, 725, 18 L. Ed., 96, also defines the power of Congress in going within the States to regulate foreign commerce:

> " 'Commerce among the States' does not stop at a State line. Coming from abroad it penetrates

> wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. *Wherever 'commerce among the States' goes, the power of the Nation, as represented in this Court, goes with it to protect and enforce its rights."*

The case of *United States* v. *Gould,* No. 15,239, 25 Federal Cases 1375, quoted at some length on pages 17 and 18 of appellant's brief, needs careful scrutiny. It is proper to "call the attention" of this Court to the fact that that case was a decision by the District Court of Alabama in 1860 just at the time when the legality of the slave trade was a much debated question. It was a matter of much factional discussion. Appellant claims that in that case the District Court held that any second party other than the original importer who brought the slave into the State could not be prosecuted under the Federal law and that such prosecution of a second party was unconstitutional. Judge Jones in that case was not so emphatic as would seem from the paragraph quoted by appellant and it will be seen that he made many qualifying statements. In addition to what counsel for appellant has incorporated in his brief, the following is quoted:

> "Looking, then, to the mischief intended to be remedied, and to the nature, extent and limits of the constitutional grant of power over this subject, I think the proper construction of the law is, that it embraces and provides for the punishment *of every person who, in any manner, directly or indirectly, participates, aids or abets in the im-*

portation of negroes as slaves. The capitalist who furnishes the money—the agents who build, charter or fit out a slave ship—the officers and crew who navigate it—those who procure the cargo, or who receive the negroes when landed, or carry them into the interior, or hold, sell or otherwise dispose of them there, for the importer—are all participants in the unlawful importation and guilty of an offense against the constitutional laws of the United States, and punishable under those laws. But after such a negro has passed out of the possession or control of the importer and his agents and employees, and has become mingled with the inhabitants of Alabama, if any person beats, murders, or otherwise criminally violates his rights, in this State, the offender is liable to indictment under the State law, and before the State tribunals alone. Whilst, as judge of this Court, I shall always be ready and willing to maintain and enforce this, and all other constitutional powers and laws of the general government, it is equally my duty not to go beyond the limits of the Constitution, or to encroach, in the slightest degree, upon the rights and jurisdiction of the States."

The clean-cut distinction to be drawn between this case and the one at bar is the wording of the indictments of each. The indictment in *U. S.* v. *Gould, supra,* did not charge that the defendant held the slave knowing her to have been unlawfully imported, but simply charged that defendant did unlawfully and knowingly hold said negro "then and there unlawfully brought in as aforesaid." In view of the above quoted dicta the district judge might have made a

different ruling had the indictment been worded in the form of the opium indictment in this case.

On page 43 of brief for appellant, counsel quotes at some length the case of *Hypolite Egg Company* v. *United States,* 220 U. S., 45, 55 L. Ed., 365, with a comment on the "broken package" rule. What the Government considers the most important part of the opinion in that case is quoted as follows:

> "It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain 'in the original, unbroken packages.' *In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.*
>
> . . . . . .
>
> In other words, the contention attempts to apply to articles of *illegitimate* commerce the rule which marks the line between the exercise of Federal power and State power over articles of *legitimate* commerce. The contention misses the question in the case. *There is here no conflict of National and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the National*

Government when they are within the borders of a State. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law."

In this decision there is a clear distinction between legitimate and illegitimate articles of commerce and the emphatic statement that outlaws of commerce or contraband may be seized wherever they may be found. Counsel for appellant in his brief states that conceding and assuming that Congress has the power to confiscate smoking opium even though it may be in the hands of second and third parties and mixed with the general mass of property of the state, that this does not *a fortiori* give Congress the power to also punish the person who has possession. Let us follow appellant's contention out to its logical conclusion. Conceding that the Government may punish A who brings the opium into the United States, they maintain that B and C who purchase from A, knowing the opium to be an outlaw import, cannot be prosecuted. If that is the interpretation of the law B may put up electric sign boards on Market street in this city with the announcement, "Smugglers, bring me " your outlaw contraband smoking opium. I will " pay $50 a can for it. I will protect any confidences. " Upon advice of legal counsel, Philip S. Ehrlich, I

"am informed that I am immune from prosecution "by the Federal Government." Is not B in the same position as the person receiving the stolen goods knowing them to have been stolen? Is he not an accessory after the fact? Is he not encouraging the unlawful importation of smoking opium? Is he not aiding, abetting and doing acts in furtherance of the importation? If you grant the Government the power to only punish A but not B, then you are not allowing to Congress the "reasonable and necessary laws" to regulate foreign commerce.

The case of *Savage* v. *Jones,* 225 U. S., 501, 56 L. Ed., 1183, quoted by appellant, is entirely beside the mark in this discussion. That decision merely held that the State might exercise its police power since it did not conflict with the authority of the Federal Government. In the conclusion of his opinion in that case Justice Hughes said:

> "That state has determined that it is necessary, in order to secure proper protection from deception, that purchasers of the described feeding stuffs should be suitably informed of what they are buying, and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They must be sustained without impairing in the slightest degree its operation and effect. *There is no question here of conflicting standards, or of opposition of State to Federal*

authority. It follows that the complainant's bill in this aspect of the case was without equity."

Counsel for appellant has quoted extensively from *Champion* v. *Ames,* 188 U. S., 321, 47 L. Ed., 492, the Lottery case, but he fails to set forth that portion of Justice Holmes' opinion which holds that not only may Congress prohibit lottery tickets from interstate commerce, but it may use all power consistent with the Constitution to drive the traffic out of commerce among the states:

> "We have said that the carrying from state to state of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from state to state is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? *Or may not Congress for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?"*

If the "broken package" rule and the "end of transit rule" apply to smoking opium why would it not also apply to an interstate commerce shipment of

counterfeit bills? Counterfeit money has also been absolutely prohibited from shipment between the States. *U. S.* v. *Marigold,* 9 Howard, 560, 566, 13 L. Ed., 257. Suppose A imports from Oregon to San Francisco, Cal., a box containing several hundred counterfeit bills. He sells them to B who breaks open the box and takes the counterfeit bills, knowing of the unlawful importation and with the intent to deceive. Is it not absurd to say that since the bills are now mixed with the general mass of property of the State and commerce has ended, the Federal Government must keep its hands off and leave it to the State to prosecute B? Such a result would make a farce of our Government.

There has been some attempt to confuse the pure food laws and the pure food cases with the opium law. Pure food legislation comes under an entirely different regulation from the contraband law. It does not deal with a thing *malum in se,* an outlaw of commerce. With great relish, counsel for appellant has cited the instance of the housewife who knowingly purchases adulterated food and asks if she should be punished. Congress has seen fit to enact a pure food law which will only hold the original importer liable. Perhaps that was all that was *"reasonable and necessary"* in these cases to stamp out such commerce. Suppose, however, Congress had found it *"reasonable and necessary"* to pass a pure food law with reference to certain articles which would read like the opium

statute under discussion, or to make it more plain, let us suppose that the words "jam made of coal tar" should be substituted for the words "smoking opium" in the opium statute. If this same housewife who conducts a boarding house should go to these same importers, Goldberg, Bowen & Co., and request that a case of their contraband, outlaw, coal tar jam, smuggled from Australia, be sent up to her home, would she not be in the same position as appellant Steinfeldt? If she knowingly began to feed this deleterious substance to her boarders should she not be prosecuted under such a law for knowingly dealing with this contraband?

VI.

THE CASE OF UNITED STATES v. KELLER IS NOT IN POINT.

Appellant bases his whole contention in this brief upon the case of *United States* v. *Keller,* 213 U. S., 138, 53 L. ed., 737, maintaining that the decision of the Supreme Court in that case which determines that the law was an infringement upon the police power of the State is particularly analogous to the second portion of Section 2 of the opium law. In noting distinctions between that case and the case at bar, it will be first seen that the Keller case was a case arising under the immigration laws which were enforced at that time by the Department of Commerce and Labor, but since which time are now under the new Department of Labor, whereas opium laws are under the

supervision of the Department of Treasury in dealing with the customs.

Appellant places Section 3 of the Immigration Rules and Regulations beside the Act of February 9, 1909, and contends they are directly analogous in their terms; however, he endeavors to pass over one obvious and important point, namely, that in the one law there is the charge that the defendant knew of the unlawful importation whereas in the other there is no such provision. That portion of the opium law in question reads as follows:

> "Or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, *knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof.*"

That portion of Section 3, the provisions of which was held unconstitutional by the Supreme Court, *U. S.* v. *Keller, supra,* is herewith set forth:

> "Or whoever shall keep, maintain, control, support or harbor in any house or other place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every case, be deemed guilty of a felony."

This provision of the immigration law does not hold that there should be any attempt whatsoever to punish a person for aiding in the unlawful importation or being an accessory after the fact. The statute

does not say that any act done by the defendant in aiding or bringing about any unlawful importation shall be punishable. That statute simply says any one who shall deal with such an alien prostitute shall be liable to the penalties therein provided. Certainly it would be unconstitutional for the Federal Government to attempt to interfere with the police powers of the State in a matter of social welfare, the health or morals of the State. However, Section 3 of the Immigration Rules and Regulations has, since the decision in the Keller case, been amended, and it now reads with such additions to its provisions as to make any one liable who furthers any unlawful importation, knowing such to be contrary to law.

That portion of Section 3 of the Immigration Rules and Regulations as amended by the Act of March 26, 1910, reads as follows:

> "Or whoever shall hold or attempt to hold any alien for any such purpose *in pursuance of such illegal importation,* or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, *in pursuance of such illegal importation,* any alien, shall, in every such case be deemed guilty of a felony."

The attention of the Court is called to the words "in pursuance of such illegal importation," which occurs twice in that portion of the statute just quoted; should the same state of facts as in the Keller case arise at the present time under this amended law the

Supreme Court would have no ground for holding that such prosecution was unconstitutional since any act which would be committed by the defendant would be in *pursuance of the original illegal importation, knowing of such unlawful entry.* Surely any person furthering the original act of the illegal importing is an accessory after the fact; so also in the case of receiving and concealing opium in the United States after importation, knowing the same to have been unlawfully imported.

When the case of *Zakonaite* v. *Wolf,* 226 U. S., 272, 57 L. ed., 219, was decided by the Supreme Court, section 3 of the Immigration Rules and Regulations as amended and quoted above was then in force. In the deportation of an alien prostitute in that case the question of the State's police power was also raised. Although the facts of the case were not analogous to those of *U. S.* v. *Keller, supra,* it was cited in the brief of appellant on the point of police power. In most emphatically deciding the constitutionality of Section 3 of the Immigration Rules and Regulations Justice Pitney said:

> "The appellant raises some other constitutional objections, viz: *that the immigration act vests in the Federal authorities the power to try an immigrant for a violation of the penal laws of the State of which he has become a resident, and so interferes with the police power of the State;* that the act vests judicial powers in an executive branch of the Government; that it violates the constitutional

guaranty of the privilege of the writ of habeas corpus, and the like. *These are without substance, and require no discussion.* Final order affirmed."

The mere fact that the having in possession smoking opium by appellant Steinfeldt was a violation of the California State Poison Law as well as a violation of the Federal Customs Law should not deny the Government of its jurisdiction to mete out punishment for the Federal offense. There is nothing antagonistic or conflicting in the existence of dual punishments for the same acts, *inasmuch as they constitute two distinct offenses,* the one against the State government, and the other against the National Government; and the right of each of these two governments to inflict punishment for the same act has repeatedly been recognized by the courts.

Moore v. *Illinois,* 14 How., 14, 20, 14 L. ed., 306, 309;

Coleman v. *Tennessee,* 97 U. S., 509, 24 L. ed., 1118;

Grafton v. *United States,* 206 U. S., 333, 354, 51 L. ed., 1084, 1091, 27 Sup. Ct. Rep., 749, 11 A. & E.

The Supreme Court of the United States also recognized this point in *Bugajewitz* v. *Adams,* 228 U. S., 584, 57 L. ed., 979. That was also a case of the deportation of an alien prostitute under Section 3 of the Immigration Laws and Regulations. It held that

the fact that the State had enacted certain laws under its police powers did not interfere with the enforcement of the Immigration Law. Justice Holmes said:

> "The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. *The coincidence of the local penal law with the policy of Congress is an accident.*"

VII.

The Government submits:

(1) That the regulation of the importation of smoking opium is a matter within the authority of the Treasury Department of the United States and is a customs regulation even though there is no import duty and the article is absolutely prohibited.

(2) That, if the prohibition of smoking opium from the United States is a regulation of foreign commerce, Congress has power to go within the State to seize any contraband or outlaw of commerce and punish the person who having knowledge of the unlawful importation, receives and conceals the same. The broken package rule and the end of transit rule have no application to the opium law which prohibits

opium from all commerce and makes it an outlaw wherever it is found.

(3) That the Constitution in conferring upon Congress the authority to make laws reasonable and necessary for the enforcement of the delegated powers enumerated in Section 8 of the Constitution cannot be construed to mean that these powers should be restricted in any absurd way.

Respectfully submitted.

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